

**Editor's note: Reconsideration denied by order dated May 27, 1981**

BUREAU OF LAND MANAGEMENT  
v.  
HOLLAND LIVESTOCK RANCH AND JOHN J. CASEY

IBLA 80-648

Decided April 27, 1981

Cross-appeals from the decision of Administrative Law Judge R. M. Steiner directing grazers to pay costs and damages for willful and repeated grazing trespasses. Nevada 2-77-3 (SC).

Affirmed.

1. Administrative Procedure: Burden of Proof--Administrative Procedure: Decisions--Administrative Procedure: Hearings--Administrative Procedure: Substantial Evidence--Evidence: Burden of Proof--Evidence: Sufficiency

After holding a hearing pursuant to the Administrative Procedure Act, an Administrative Law Judge may properly find that a person has committed a grazing trespass if that finding is in accordance with and supported by reliable, probative, and substantial evidence.

2. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses: Cancellation or Reduction--Grazing Permits and Licenses: Trespass

An Administrative Law Judge's finding that trespasses were willful, grossly negligent, and repeated will not be disturbed on appeal where the record amply supports such finding.

3. Grazing Permits and Licenses: Generally--Grazing Permits and Licenses:  
Cancellation or Reduction--Grazing Permits and Licenses: Trespass

Where penalties imposed by an Administrative Law Judge for trespasses are supported by the record and comport with the proscriptions of the regulations they will not be modified on appeal unless it appears that they are unreasonable, inequitable, or otherwise inappropriate.

APPEARANCES: James E. Turner, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management; Thomas L. Belaustegui, Esq., Reno, Nevada, for Holland Livestock Co. and John J. Casey; and Bryce Rhodes, Esq., Reno, Nevada, for intervenor, John Hancock Mutual Life Insurance Company.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

These are cross appeals filed by the Bureau of Land Management on the one hand, and by Holland Livestock Ranch and John J. Casey on the other, from the May 12, 1980, decision of Administrative Law Judge R. M. Steiner, finding appellants John J. Casey and the Holland Livestock Ranch liable for monetary damages for willful and repeated grazing trespasses, and for the cost incurred in the removal and impoundment of appellants' cattle found in trespass on the Federal range in an area which had been formally closed to all grazing use. The cost of removal and impoundment was determined to be \$17,272.64 less \$2,194.74, the amount received from sale of the impounded cattle. <sup>1/</sup> Because the trespasses were found to be willful and repeated, damages were computed at twice the commercial forage value rate of \$3.50 per animal unit month (AUM), or \$49 for the 7 AUM's of forage consumed by the trespassing stock.

The decision below involves three incidents of trespass variously numbered NV-020-3-094, NV-020-3-095, and NS-020-3-101, occurring in the Granite Mountain Fire Rehabilitation Area of the Buffalo Hills Allotment

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<sup>1/</sup> For the sake of clarity, the grazing appellants, Holland Livestock Ranch and John J. Casey will be referred to hereinafter as "appellants," and the Bureau of Land Management, despite its status as cross-appellant, will be referred to as "BLM." John Hancock Life Insurance Company holds a beneficial interest in the private lands to which the subject grazing licenses apply, and has intervened only for the purpose of receiving service of documents.

between March and October of 1976. Appellants' private land holdings intermingle with public lands in the area. <sup>2/</sup>

The issues as stated by appellants in their brief to the Board on appeal are essentially as follows:

A. Whether the evidence presented was sufficient to establish actual location of the cattle alleged to be upon public lands; and

B. Whether the evidence presented was sufficient to establish that the alleged trespasses, if any, were willful and repeated trespasses.

Additionally, the Bureau of Land Management (BLM), in its responding brief on appeal, questions whether Administrative Law Judge Steiner's decision not to invoke sanctions beyond payment of damages for forage consumed and impoundment costs was sufficiently severe in light of appellants' repeated and willful trespasses, and asks that the grazing privileges of the appellants be completely and permanently revoked in the Winnemucca District.

We have reviewed the record in this case and have concluded that Judge Steiner's summary of the facts and testimony is accurate.

It is appellants' contention that the methods employed by BLM to determine that cattle were in trespass were fraught with errors. Specifically, appellants assert that: "The testimony adduced at the hearings demonstrated that the reliability of Respondent's maps is greatly in question and that the ability to precisely determine the ground position of cattle using such maps is unlikely." Appellants base this argument, in part, on the testimony of Paul Simpson, a licensed consulting land surveyor and civil engineer, who stated that there was insufficient evidence on the Buffalo Hills Planning Unit map to make an accurate determination of the land status in the closure area. However, Mr. Simpson did admit that he had not done any formal survey of the Buffalo Hills himself, and that the use of landmarks and monuments could lead to an accurate location of an object on the ground.

Judge Steiner made the following findings of fact regarding appellants' trespasses:

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<sup>2/</sup> Holland Livestock Ranch and John J. Casey are in copartnership owned by three corporations. The three corporations are all wholly owned by John J. Casey.

Trespass NV-020-3-094

During the March 29, 1976 inspection, seven cattle with Mr. Casey's brand on them were found on Section 36, T. 35 N., R. 22 E. near the Granite Mountain drift fence. On March 30, 1976, 34 cattle belonging to Mr. Casey were rounded up near Granite Creek in Section 34, T. 34 N., R. 23 E., on public lands. On the same day, another seven head of cattle belonging to Mr. Casey were seen in Section 3 of T. 34 N., R. 22 E. Those cattle got away. Also on March 30, 1976, Mr. Boni collected seven head of cattle belonging to Mr. Casey were collected in Section 22, T. 34 N., R. 23 E. Eleven head of cattle were seen in Section 11, T. 34 N., R. 22 E. Four of the cattle got away. Another three head were rounded up near Cottonwood Creek in Section 36, T. 35 N., R. 23 E., but they were not corraled [sic]. Of the total 16 cattle corraled [sic] on March 31, 1976, 11 belonged to Mr. Casey. This evidence has not been refuted by the Respondents. All of the personnel rounding up cattle were instructed to gather cattle found only on public lands. Maps and landmarks were utilized to insure that the cattle were on public lands before the cattle were impounded.

Based on the evidence in the record, I find that seven cattle owned by the Respondent were in trespass on Federal lands on March 29, 1976. Likewise, 48 cattle were in trespass on March 30, 1976. Only 11 cattle belonging to the Respondents were in trespass on March 31.

Trespass NV-020-3-095

On August 4 and 5, 1976, Mr. Boni was able to identify 20 cattle bearing Mr. Casey's brand on public lands in the Granite Mountain Fire Rehabilitation area. However, no determination was made that such a number of cattle remained there until September 2, 1976. A livestock count certificate prepared by Mr. Boni stated that 20 cattle with Mr. Casey's brand on them were in the Granite Mountain area on August 4 and 5, 1976. Ex. 13. Based on this certificate and Mr. Boni's testimony, 20 cattle belonging to Mr. Casey are found to be in trespass on August 4 and 5, 1976.

Trespass NS-020-3-101

On October 27, 1976, several teams from the BLM began rounding up cattle in the closure area. Mr. Patterson impounded 36 cattle found in the area of

Section 3, T. 34 N., R. 22 E., publicly owned land. Although other cattle with brands or earmarks belonging to Mr. Casey were seen that day, they were not impounded. The following day, October 28, 1976, more cattle were found in the closure area. Mr. Patterson collected 25 cattle in Sections 16, 17, 20, and 21, T. 34 N., R. 23 E. These lands are in the Federal ownership. Mr. Whitley also impounded 17 cattle found in Section 2, T. 33 N., R. 23 E. and Section 34, T. 34 N., R. 23 E., on October 28, 1976. These lands are also in public ownership. A Nevada State Brand Inspection Certificate reveals that 49 of the impounded cattle bore brands registered to Mr. Casey. It is unclear what numbers of cattle belonging to Mr. Casey were impounded on each particular October date. However, the record indicates that Mr. Casey claimed all of the cattle impounded. Therefore, all of the cattle impounded must have belonged to him. The complaint provides that only 22 cattle were in trespass on October 27, 1976 and 27 cattle in trespass on October 28, 1976. Trespass damages will be limited to those numbers.

(Decision at 16, 17).

Judge Steiner concluded the following at page 17 of his decision: "Although the Respondents offered testimony disputing the reliability of the status maps used by BLM employees in determining what lands were in private or public ownership, it has not been shown that the methods employed by the BLM were unreliable or inaccurate."

[1] The decision appealed from set forth in detail the evidence relied upon to substantiate the individual trespasses found by the Administrative Law Judge to have occurred. The contentions presented to the Board by appellants were fully considered by the Judge. On appeal, appellants suggest in addition that the quantum of evidence adduced to support the alleged trespasses may not have been "substantial" as required by the Administrative Procedure Act, 5 U.S.C. § 556(d) (1976), which reads in part: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." Substantial evidence has been described as the kind of evidence a reasonable mind might accept as adequate to support a conclusion. John W. McGrath Corp. v. Hughes, 264 F.2d 314 (2nd Cir. 1959), cert. denied, 360 U.S. 931 (1959). In Bureau of Land Management v. Ross Babcock, 32 IBLA 174, 183-84, 84 I.D. 475, 479-80 (1977), the Board stated with respect to sufficiency of evidence:

In a hearing held pursuant to the Administrative Procedure Act, a decision must be in accordance with and supported by reliable, probative, and substantial evidence, but the decision need not be supported by so much evidence as would dispel all reasonable doubt. 5 U.S.C. § 556(d) (1970). Therefore, an Administrative Law Judge may properly find a grazing trespass has been committed where there is reliable, probative and substantial evidence of the trespass.

The decision below more than meets this test and appellants' challenges fall short of demonstrating error therein. Accordingly, we find no reason to disturb the findings and conclusions of the decision with respect to the issue of sufficiency of evidence to prove cattle in trespass.

[2] The second issue raised by appellants in their brief to the Board on appeal, questions whether the evidence presented was sufficient to establish that the trespasses were willful and repeated. Appellants argue that in order to prove the trespasses willful, it must have been shown that they resulted from either acts or omissions on the part of appellants. In essence appellants assert that BLM should be estopped from alleging the occurrence of trespasses because BLM failed to properly construct and/or maintain certain fences. Appellants assert that the poor condition of the Granite Mountain Drift Line Fence (drift line fence) was a major factor in the cattle's ability to enter the closure area. Appellants contend that no notice of the intended construction of the drift line fence was ever received and therefore they disclaim any responsibility for maintenance of the fence. Appellants also suggest that the method of construction and the placement of the drift line fence had the effect of precipitating the trespasses at issue.

The quantum and nature of the evidence required as a prerequisite to a finding of "willfulness" has been examined in a number of prior Board decisions.

In determining whether grazing trespasses are willful, intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that a licensee's conduct was so lacking in reasonableness or responsibility that it became reckless or negligent. Holland Livestock Ranch, 52 IBLA 326, 88 I.D. (1981); Herrera v. Bureau of Land Management, 38 IBLA 262, 267 (1978); Eldon Brinkerhoff, 24 IBLA 324, 337, 83 I.D. 185, 190 (1976); J. Leonard Neal, 66 I.D. 215 (1959).

In Bureau of Land Management v. Holland Livestock Ranch, 39 IBLA 272 (1979), the Board adopted Administrative Law Judge Sweitzer's disposition of similar arguments as follows:

The short answer to these contentions is that estoppel is generally not applicable against the government. See Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380 (1947). Despite the Merrill case, however, many circuit court cases have applied the doctrine of equitable estoppel against the government where "justice and right require it." See Davis, Administrative Law of the Seventies, § 17.01 (1976). However, in those cases which have held the government estopped, certain elements have been proved to invoke the defense. The Supreme Court has held that:

As a general rule laches or neglect of duty on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest \* \* \* Utah Power & Light Co. v. U.S., 243 U.S. 389, 409 (1917).

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Even if the facts alleged are true, respondents' conduct in allowing their cattle to graze on the federal range can in no way be said to be based on ignorance of the true facts, i.e., that the fences were not constructed or properly maintained or that wild horses and burros were tearing down fences. Respondents knew or should have known the conditions complained of at the time cattle were placed on the range and cannot be said to have justifiably relied on any promise of action on the part of the government. The government may be in some small part responsible for conditions which would tend to make prevention of trespasses by respondents more difficult, but the allegations of respondents do not approach the requirements for invoking estoppel as a defense. [Footnote omitted.]

39 IBLA at 287-88. For a more definitive analysis of the application of estoppel against the government, see United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978).

Alternatively, appellants contend that the Judge erred in finding the trespasses to be willful in that they assert that the trespasses were beyond their control because fences were destroyed and gates left open by other users of the Federal range. Appellants state that they made efforts to round up and remove cattle when notice of trespasses was actually received. Judge Steiner rejected appellants' assertions as stated in their testimony, and gave the following summation of the evidence leading him to conclude that the trespasses were willful (Decision at 17, 18).

[A]ny attempts to shift the blame for cattle trespass on other users of the Federal Range who may have left gates open in the closure area will be disregarded. John E. Walton, 18 IBLA 237, 238 (1972); also see John Gribble, 4 IBLA 134 (1971).

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After a review of collective events surrounding the trespasses occurring in March, August and October, 1976, in the Granite Mountain Fire Rehabilitation Area, I conclude that the Respondents acted in an unreasonable and irresponsible manner and that the subject trespasses were willful. Mr. Casey was aware, or should have been aware, of the grazing restrictions in the closure area which was set forth in his 1976 grazing licenses. His employment of only a single full-time employee to prevent the trespass of cattle in the entire closure area hardly provided an adequate safeguard to prevent cattle, numbering in the hundreds belonging to Mr. Casey, from entering the closure area the perimeter of which is over 40 miles. (See Ex. 11).

Moreover, after Mr. Casey was notified of the August trespasses, he still failed to increase his staff to prevent further trespasses. Although he stated that he tried to prevent further trespasses himself, at most, he rounded up cattle in the closure area three times. Repeated trespasses occurred in October. In addition, Mr. Casey waited until September 2, 1976 before removing cattle in trespass found in the area on August 4 and 5. Notice of such trespass was given on August 25, 1976. For over a month, none of Mr. Casey's employees discovered that cattle were in trespass. Such events indicate that corrective action was not diligently taken. The Respondents have attempted to shift the blame on unknown third parties who may have left gates open on the drift fence. Regardless of what others may have done to allow cattle to drift into the closed area, the Respondents are under a duty to remove cattle promptly after notice. Consequently, I find that the cattle were in trespass due to the unexcusable neglect of the Respondents in lacking the proper control over cattle and the lack of diligence in taking preventive and corrective action. [citations omitted.]

Where the number of cattle grazing on the Federal range exceeds the number allowed by license and such excess is attributable solely to a permittee's lack of control over his cattle and lack of diligence in taking corrective action after being informed by the Bureau of Land



Management that the excess existed, a finding of willful trespass is warranted. Cesar and Robert Siard, 26 IBLA 29 (1976). The repetitive nature of grazing trespasses coupled with a negligent failure of permittee to take corrective action supports a finding of willful trespass. Calvin C. Johnson, 35 IBLA 306, 315 (1978).

As we recently noted in Holland Livestock Ranch, *supra* at 350, this Board has often noted the great deference which is accorded findings of Administrative Law Judges premised on conflicting testimony. See, e.g., United States v. Melluzzo, 32 IBLA 46 (1977), *aff'd*, Melluzzo v. Andrus, No. CIV-79-28-PHX-CAM (D. Ariz. May 20, 1980); State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971). This deference is based on the realization that the trier of fact, who presides over a hearing, has an opportunity to observe the witnesses and is in the best position to judge the weight to be accorded conflicting testimony. United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417, 418 (1973). Appellants' arguments fail to demonstrate error in the decision. The Judge's findings are amply supported by the record and we will not disturb them here.

With respect to the issue of "repeatedness", appellants argue that any trespasses which might have occurred were the result of the reconstruction of the drift line fence and not because of appellants' conduct. Judge Steiner, after reviewing the evidence, concluded the following:

Little need be said about the repetitive trespasses committed by Mr. Casey in the Winnemucca Grazing District. The recent decision of the Interior Board of Land Appeals, involving the Holland Livestock Ranch, cited above, approved permanent reduction of Mr. Casey's grazing privileges. The prior Departmental decisions clearly show repetitive trespassing on public lands. No doubt, the present trespasses involving over a hundred head of cattle during an eight month span, and lacking prompt remedial action which could have prevented further trespasses, is indicative of Mr. Casey's indifference toward management of his cattle on the Federal Range. As a result thereof, a trespass fine of twice the commercial rate per AUM, stipulated to be \$3.50 per AUM, is warranted.

(Decision at 18).

We find that the evidence in the record before us of the trespasses occurring between March and October of 1976, would, by itself, support findings of both "willfulness" and "repeatedness."

The concluding portion of Judge Steiner's decision is as follows:

Administrative Law Judge Ratzman issued a decision on February 14, 1980 (N2-78-1) for trespass in the Winnemucca

District revoking the Respondents' grazing privileges for a period of eight years. In light of that decision, no further revocation of the Respondents' grazing privileges will be ordered for the trespasses proven in this proceeding.

(Decision at 18-19). Judge Steiner imposed damages of \$49 for forage consumed, plus \$15,077.90 for impoundment costs, which the record clearly supports.

[3] BLM has urged that Judge Steiner's decision, which did not include suspension, reduction, or revocation of appellants' grazing privileges in the Winnemucca District, is insufficiently severe in light of appellants' willful and repeated trespasses.

While the evidence in the record before us clearly establishes grounds for reduction, suspension, or revocation of appellants' grazing privileges, we must agree with Judge Steiner's decision. Penalties in addition to those already imposed by Administrative Law Judge Ratzman in his February 14, 1980, decision recently affirmed in Holland Livestock Ranch, *supra*, affecting the same appellants, in the same grazing district would have no greater effect than the 8-year suspension that decision imposed.

Where penalties imposed by an Administrative Law Judge for trespass are supported by the record and comport with the proscriptions prescribed by regulation, they will not be modified on appeal unless it appears that they are unreasonable, inequitable, or otherwise inappropriate. There is insufficient reason for the Board to substitute its judgment for that of Judge Steiner as far as a reduction of appellants' privileges is concerned.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Douglas E. Henriques  
Administrative Judge

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Bruce R. Harris  
Administrative Judge

